89-1114

Supreme Court, U.S.
FILED
JAN 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

BETTY DONALDSON, DERYL W. DONALDSON and CHARLES H. ELLER, as Executor of the Estate of FAYE RAYE ELLER, deceased

Petitioners,

No. 84-L-73 and 85-L-169

vs.

HOPKINS TOWNSHIP, ILLINOIS, a municipal corporation, and WHITESIDE COUNTY, ILLINOIS, a municipal corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Randall K. Reese
William E. Gottfred,
REESE & REESE
979 North Main Street
Rockford, Illinois 61103
815/968-8851

QUESTIONS PRESENTED

Have the petitioners been wrongfully deprived of a vested constitutional property right?

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TO THE SUPREME COURT OF ILLINOIS

OPINION BELOW

The Opinion of the Appellate Court of Illinois, Third District, is contained herein as Appendix A, and the citation thereof is No. 3-88-0039 (1989).

JURISDICTIONAL STATEMENT

The Appellate Court of Illinois, Third District rendered its judgment on January 13, 1989. A timely petition for rehearing was denied on April 21, 1989.

A Petition for Leave to Appeal to the Illinois Supreme Court was timely filed and was denied on October 5, 1989, and this Petition for Writ of Certiorari is timely filed within ninety (90) days thereafter.

The decision of the Appellate Court is called into question on the ground that it deprived petitioners of a vested property right, in violation of the 14th Amendment to the United States Constitution.

This petition is filed under the provisions of 28 U.S.C. Section 1257(b) and appropriate rules of this Court.

STATUTES INVOLVED

Ill Rev. Stat. ch. 85, ¶3-104(b) (1965), states:

Neither a local public entity nor a public employee is liable under this Act for an injury caused by the failure to provide traffic warning signals, signs, markings or other devices unless such a signal, sign, marking or device was necessary to warn of a condition which endangered the safe movement of traffic, and which would not be reasonably apparent to or anticipated by a person in the exercise of due care.

Ill. Rev. Stat. ch. 85, ¶3-104 (1987), states:

Neither a local public entity nor a public employee is liable under this Act for an injury caused by the failure to initially provide regulatory traffic control devices, stop signs, yield right-of-way signs, speed restriction signs, distinctive road markings or any other traffic regulating or warning sign, device or marking, signs, overhead lights, traffic separating or restraining devices or barriers.

STATEMENT OF THE CASE

On April 24, 1983, petitioners, BETTY A. DONALDSON and FAYE RAYE ELLER, deceased, were involved in an automobile accident. The vehicle in which they were passengers was proceeding in a northerly direction on Habben Road in Whiteside County. At that time another vehicle was traveling in an easterly direction on Hazel Road in Whiteside County. Habben Road and Hazel Road intersect. Habben Road is maintained by Whiteside County. Hazel Road is maintained by Hopkins Township. The intersection of the two roads was maintained by Whiteside County. An accident occurred involving those two vehicles at that intersection.

Just prior to the intersection, Habben Road has a vertical curve so that the intersection is in a depression. The intersection is not readily visible until

in close proximity with it, depriving a driver on Habben Road with any warning of the intersection and of the ability to stop at the intersection if necessary.

At the time of the accident, there existed a statute in the State of Illinois stating a duty of a municipality to warn of a condition which endangered the safe movement of traffic. Rather than applying that statute, in rendering its decision, the Appellate Court of Illinois premised its decision on a 1987 amendment of that statute which substantially lessened the duty of a municipality.

ARGUMENT FOR GRANTING THE WRIT

All of the proceedings, pleadings, argument, and decisions at the trial court level, pertaining to Illinois Revised Statutes ch. 85, ¶3-104, were premised upon the 1965 version of that statute. That statute provided in substance that there was a duty on the part of a municipality to warn drivers of a condition on a highway where the condition endangered the safe movement of traffic and which would not be reasonably apparent to or anticipated by a person in the exercise of due care. The 1987 amendment to that statute, upon which the Appellate Court relied for its decision, substantially revised the 1965 statute. The 1987 statute states in substance that a municipality is not liable for any injury caused by the failure to initially provide warning of a condition on a highway. The statutes are

opposite regarding duty. The 1965 statute places a duty on the municipality to initially post warning signs of an unsafe condition, whereas the 1987 statute states affirmatively that there is no such duty. The Appellate Court, however, relied fully upon the 1987 statute in holding that Whiteside County owed no duty to petitioners, although the accident occurred on April 24, 1983.

There is no question that the statute codified the common law duty to warn. The Illinois Supreme Court in Janssen v. City of Springfield, 79 Ill.2d 435, 404 N.E.2d 213 (1980), specifically held that the common law duty to warn motorists of a dangerous condition was codified in ¶3-104(b).

Petitioners contend that the Appellate Court's reliance on and implementation of the 1987 statute in its decision deprives

them of a vested constitutional property right in their cause of action. This Court has previously held that a cause of action constitutes a property right protected by the 14th Amendment to the Constitution of the United States. Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. ___, 99 L.ED.2d 565, 108 S.Ct. 1340 (1988). The Illinois Supreme Court in Hogan v. Bleeker, 29 Ill.2d 181, 193 N.E.2d 844 (1963), held that statutes are not to be construed retroactively where to do so would deprive one of a vested property right. In Illinois a statute cannot be applied retroactively without express provisions stating that the act is to have retroactive effect. Mulligan v. Joliet Regional Court District, 123 Ill.2d 303, 527 N.E.2d 1264 (1988). Here, the statute had no such provision for retroactive applica-

tion. The date for determining which statute is applicable is when the cause of action accrued. Zielnik v. Loyal Order of Moose, Lodge No. 265, 174 Ill.App.3d 409, 528 N.E.2d 384 (1988). Thus, there is no question that the Appellate Court should have applied the 1965 statute rather than the 1987 amendment of that statute. In basing its decision upon the 1987 statute, the Appellate Court has deprived petitioners of their vested constitutional property right in their cause of action, in violation of the 14th Amendment to the Constitution of the United States.

CONCLUSION

The petitioners' vested constitutional right in their cause of action has been taken from them. The Appellate Court of Illinois based their decision upon the wrong statute. The 1987 amendment to the

statute drastically altered the duty of a municipality. The 1965 statute, in effect at the time of accident, had codified the common law duty to warn, and that statute should have been applied to this case. As such, petitioners request that this Court grant their writ of certiorari.

Respectfully submitted,

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Attorneys for Petitioners, Betty Donaldson, Deryl W. Donaldson and Charles M. Eller, as Executor of the Estate of Faye Raye Eller, deceased,

APPENDIX

APPENDIX A

No. 3-88-0039

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D. 1988

BETTY A. DONALDSON and DERYL W. DONALDSON, Plaintiffs-Appellants, v. HOPKINS TOWNSHIP, ILLINOIS, a municipal corporation, and WHITESIDE COUNTY ILLINOIS, a municipal corporation, Defendants-Appellees,	Appeal from the Court of Whiteside Count Nos. 84 L 73 85 L 169 Honorable Robert W. Castendyck Judge Presiding
CHARLES M. ELLER, as Executor of the Estate of FAYE RAYE ELLER, deceased, Plaintiff-Appellant, v. HOPKINS TOWNSHIP, ILLINOIS, a municipal corporation, and WHITESIDE COUNTY, ILLINOIS, a municipal corporation, Defendants-Appellees.	

ORDER

Plaintiff, Betty Donaldson, was a passenger in an auto proceeding northerly on Habben Road, in Whiteside County, IL. William Rector was driving an auto easterly on Hazel Road in Hopkins Township, Whiteside County, IL. Rector's auto collided with Donaldson's auto in the intersection of Habben Road and Hazel Road. Mrs. Donaldson sustained injuries in the accident which rendered her a quadriplegic.

The intersection of the two roads was maintained by Whiteside County. Stop signs on Hazel Road for eastbound and westbound traffic were under the control of Whiteside County.

Mrs. Donaldson brought suit against Hopkins Township and Whiteside County.

She alleged that Habben Road should have contained a sign indicating an approaching intersection. She also asserted that Hazel Road was in poor condition. Both defendants obtained summary judgment and this appeal ensued.

The plaintiff primarily asserts upon appeal that Whiteside County owed her a duty to warn of the approaching dangerous intersection. She also alleges that Hopkins Township failed to maintain Hazel Road in a safe condition.

A motion for summary judgment should only be granted if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. (Ill. Rev. Stat. 1987, ch. 110, par. 2-1005.) If all of the evidence presented to the trial

court does not raise an issue of material fact, then the motion for summary judgment should be granted, if warranted as a matter of law. Kramer v. Weedhopper of Utah, Inc. (1986), 141 Ill. App. 3d 217, 490 N.E.2d 104.

In a cause of action alleging negligence, the plaintiff must establish the existence of a duty, a breach of that duty and an injury proximately resulting from the breach of the duty. Pelham v. Griesheimer (1982), 92 Ill. 2d 13, 440 N.E.2d 96.

The plaintiff contends that defendant Whiteside County had a duty to post a crossroad warning sign on Habben Road to warn of the dangerous intersection which it maintained, pursuant to the Local Governmental and Governmental Employees Tort Immunity Act (Ill. Rev. Stat. 1987, ch. 85, par. 3-104), and the Illinois

Vehicle Code (Ill. Rev. Stat. 1987, ch. 95½, par. 11-304).

We find that neither statute imposes a duty upon Whiteside County to post a crossroad warning sign. Furthermore, we believe that a similar common law duty does not exist.

The cited provision of the Vehicle Code does not mandate that a warning sign be placed prior to the intersection. The statute empowers local authorities to maintain such traffic control devices upon highways under their maintenance jurisdiction as are required to indicate and carry out the provisions of the Illinois Manual on Uniform Traffic Control Devices for Streets and Highways. (Ill. Dept. of Transportation (1979).) As a matter of law, the statute does not impose an obligation upon Whiteside County to post a

crossroad warning sign. The Manual's language is not imperative nor mandatory.

Similarly, the Local Governmental and Governmental Employee's Tort Immunity Act is an act relative to the tort immunity of local public entities and their employees. The statute confers immunities; and its extension as a basis for liability is not warranted by the facts at bar.

The plaintiff places principal reliance upon the Illinois Supreme Court decisions in Bentley v. Saunemin Township (1980), 83 Ill. 2d 10, 413 N.E.2d 1242, and Janssen v. City of Springfield (1980), 70 Ill. 2d 435, 404 N.E.2d 213. These cases, when carefully considered, present distinguishable factual circumstances then those at bar. In Bentley the court held that a township and its highway commissioner have a duty of reasonable care in maintaining the visibility of a stop

sign placed by the State at an intersection of township and State roads. In Janssen, the city was found to have a statutory obligation to post warning of the hazard created by a traffic island which projected 5½ feet into the outer lane of an intersection of a State highway that was under State control. While Janssen is illustrative of the scope of the duty imposed upon cities and municipalities, its rule does not encompass the factual avernments of the case at bar and the evidence in the trial record. The imposition of a sign posting obligation need be clearly mandated. The subject intersection cannot be said to require a warning sign under the statutes of this state.

Furthermore, the traditional common law duty of local governments concerning public property is a duty to maintain that property in a reasonably safe condition.

(Curtis v. County of Cook (1983), 98 Ill. 2d 158, 456 N.E.2d 116.) The duty is only to maintain the property and does not require the creation of public improvements. (American State Bank v. Cude (1975), 30 Ill. App. 3d 206, 331 N.E.2d 825.) Thus, under the facts alleged here, Whiteside County owed no common law duty to Mrs. Donaldson to erect a crossroad warning sign.

The defendant also appeals the summary judgment entered in favor of Hopkins Township. The plaintiff asserts that the defendant failed to repair and maintain Hazel Road. She further asserts that the stop sign on Hazel Road was placed too close to the ground and too close to the road.

We find the plaintiff's propositions void of support in the record. Liability cannot be predicated upon conjecture, but

must be certainly established. A prima facie case has not been alleged. The plaintiff has also failed to establisn a causal relationship between the alleged negligence and the injury she sustained.

The plaintiff has principally relied upon her contention that the trial court's exclusion of Mr. Rector's testimony at the time of his deposition, to the effect it was his habit, when driving, to swerve to avoid potholes, was in error. She asserts that Mr. Rector swerved to avoid potholes on Hazel Road and thus had his focus on the road surface and not on the signs posted at the roadside.

In Illinois, evidence of habit is not admitted on the basis of its probative value; it it admitted when it is necessitated due to an absence of eyewitnesses. The rule's application extends to cases where the eyewitnesses were silenced by

death, amnesia, mental incompetency or a statutory bar. In the instant case, Mr. Rector is able to relate enough of the circumstances of the accident tnat his own habit testimony would be inadmissible.

For all of the foregoing reasons the judgment of the circuit court of Whiteside County in favor of the defendants, Hopkins Township and Whiteside County is affirmed.

Affirmed.

WOMBACHER, J. , with STROUDER, P.J; HEIPLE, J., concurring.

APPENDIX B

STATE OF ILLINOIS

THIRD DISTRICT APPELLATE COURT

Roger Johnson,
Clerk
815 434-5050

1004 Columbus Street
Ottawa, Illinois
61350

Be it Remembered, That, to wit: On the 21st day of April, 1989, certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz:

3-88-0039

Betty A. Donaldson and Deryl W. Donaldson. Plaintiffs-Appellants,	APPEAL FROM: Whiteside County
vs.	Hon. Robert W. Castendyck
Hopkins Township, Illinois and Whiteside County, Defendants-Appellees.	84 L 73 & 85 L 169 (Consolidated)

Now on this day this cause coming on for hearing upon the petition for rehearing filed by Reese & Reese, herein,

and the Court having duly considered said petition, as well as the matters and things alleged in support thereof, and being now fully advised in the premises;

It is therefore ordered by the Court that said petition for rehearing be and the same is hereby overruled and denied.

/s/ Roger Johnson
Clerk of the Appellate Court

APPENDIX C

2350/5972.AGK;pml

STATE OF ILLINOIS)
) SS
COUNTY OF WHITESIDE)

IN THE CIRCUIT COURT FOR THE 14TH
JUDICIAL CIRCUIT
WHITESIDE COUNTY, ILLINOIS

CHARLES ELLER, as Executor of for the Estate of FAYE RAYE ELLER, deceased, Plaintiff, v. HOPKINS TOWNSHIP, ILLINOIS, a municipal corporation and WHITESIDE COUNTY, ILLINOIS, a municipal corporation, Defendants.	No. 85 L 169 and 85 L 73 (Consolidated)
BETTY A. DONALDSON and DERYL DONALDSON, Plaintiffs, v. HOPKINS TOWNSHIP, ILLINOIS a municipal corporation and WHITESIDE COUNTY, ILLINOIS, a municipal corporation, Defendants.	No. 84 L 73

ORDER

THIS MATTER coming onto be heard on the Defendant, WHITESIDE COUNTY'S, Motion for Summary Judgment, due notice having been given and the matter having been fully briefed by the parties, the Court having considered the briefs of the parties and the cases cited therein and the Court having heard oral arguments of the parties through their respective counsel and the Court having filed its MEMORANDUM OPINION of December 9, 1987;

IT IS HEREBY ORDERED AS FOLLOWS:

1. Defendant, WHITESIDE COUNTY'S, Motion for Summary Judgment is hereby granted and the cause herein pending against said Defendant is hereby dismissed with prejudice pursuant to this Court's MEMORANDUM OPINION filed December 9, 1987, which is fully incorporated herein by reference and made a part of this Order as if it was fully set forth herein;

2. The Court finds no just cause to delay the enforcement or appeal of this matter.

DATED: December 21, 1987

ENTERED: /s/Judge Robert W. Castendyck
Judge Robert W. Castendyck

CHARLES C. HOPPE, JR.
JUDGE & KNIGHT, LTD.
ATTORNEYS FOR DEFENDANT
422 N. Northwest Highway
Suite 200
Park Ridge, Illinois 60068
(312) 696-2310

IN THE CIRCUIT COURT OF THE FOURTEENTH
JUDICIAL CIRCUIT
WHITESIDE COUNTY, ILLINOIS

BETTY A. DONALDSON and DERYL W. DONALDSON,	)	
Plaintiffs,	)	
vs.	)	
HOPKINS TOWNSHIP, ILLINOIS, a municipal corporation, and WHITESIDE COUNTY, ILLINOIS, a municipal corporation,	)	NO. 84-L-73
Defendants.	)	
CHARLES M. ELLER, as Executor for the Estate of Faye Raye Eller, Deceased,	)	
Plaintiff,	)	
vs.	)	
HOPKINS TOWNSHIP, ILLINOIS, a municipal corporation, and WHITESIDE COUNTY, ILLINOIS, a municipal corporation,	)	NO. 85-L-169
Defendants.	)	

JUDGMENT FOR DEFENDANT, HOPKINS TOWNSHIP, AN ILLINOIS MUNICIPAL CORPORATION

This case coming on for hearing on Motion by defendant, Hopkins Township, a

municipal corporation, as amended, for summary judgment in its favor in each of the above entitled cases; the parties being represented by their respective attorneys; and the Court having considered the Motion as amended, the Affidavit of Irwin J. Wolber, and the exhibits attached to the Motion, and having heard argument of counsel and being fully advised in the premises;

NOW, THEREFORE, the Court grants and sustains the Motion by defendant, Hopkins Township, Illinois, a municipal corporation.

WHEREFORE, IT IS ORDERED by the Court that judgment be, and it is hereby, entered against plaintiff and in favor of defendant, Hopkins Township, Illinois, a municipal corporation, in each of the above entitled cases; that the above entitled cases and each of them be, and

they are hereby, dismissed with prejudice.

Dated: December 21, 1987.

ENTER:

/s/ Robert W. Castendyck
JUDGE

IN THE CIRCUIT COURT OF THE FOURTEENTH
JUDICIAL CIRCUIT
WHITESIDE COUNTY, ILLINOIS

BETTY A. DONALDSON, and DERYL W. DONALDSON,	)	
Plaintiffs,	)	
-vs-	)	
HOPKINS TOWNSHIP, ILLINOIS, a Municipal Corporation, and WHITESIDE COUNTY, ILLINOIS, a Municipal Corporation,	)	
Defendants.	)	Case No. 84 L 73
CHARLES M. ELLER, as Executor for the Estate of Faye Raye Eller, Deceased,	)	Case No. 85 L 169
Plaintiff,	)	
-vs-	)	
HOPKINS TOWNSHIP, ILLINOIS, a Municipal Corporation, and WHITESIDE COUNTY, ILLINOIS, a Municipal Corporation,	)	
Defendants.	)	

MEMORANDUM OPINION

There is no dispute as to the pertinent facts of these cases.

Betty Donaldson and Faye Rae Eller were passengers in an automobile on Habben Road approaching the intersection of Hazel Road in Whiteside County, Illinois. There were stop signs on Hazel Road for east and west traffic at the intersection and a stop sign was located west of the intersection. It was reflectorized in accordance with the provisions of the Illinois Manual on Uniform Traffic Control devices.

An accident occurred on April 24, 1983 at approximately 8:00 P.M. The weather was clear and the pavement dry. No objects or obstructions prevented either driver, who was involved in the accident, from having a clear and unobstructed view of the roadway upon which said driver was traveling.

William Rector was traveling eastbound on Hazel Road and should have stopped at

the stop sign. He failed to do so and the accident occurred.

Motions to Strike or Dismiss were previously denied by this court. At that time, the court, in effect, ruled that the amended complaint set forth sufficient facts, which, if proven, would give rise to a cause of action. Since that time, discovery has been completed and this court must now rule whether or not the facts determined do or do not give rise to a duty for the breach of which a cause of action exists.

The defendants assert that the facts as now established, as a matter of law, fail to prove the existence of duties owed by defendants, the breach of which proximately caused the injuries to the plaintiffs.

The plaintiffs, in order to recover, must show a duty or duties on the part of

the defendants, a breach of the same, that injuries were sustained and that the breach or breaches were the proximate cause of the injuries.

Plaintiffs claim the defendant, Whiteside County had a duty to post a crossroad sign on Habben Road and to reduce the speed limit on said road below the statutory maximum of 55 m.p.h.

They further assert that defendant Hopkins Township had a duty to provide an illuminated or reflectorized "Stop Ahead" sign for eastbound traffic on Hazel Road. It appears this was done.

They further claim said defendant negligently and carelessly failed to repair and maintain Hazel Road and failed to place certain warning devices when it had a duty to do so.

The Court, after carefully considering the briefs and arguments of counsel finds

there was no duty on the part of Whiteside County as claimed by plaintiffs.

The court further finds there was no duty on the part of Hopkins Township to place warning devices as claimed.

While said Township did have a duty to repair and maintain Hazel Road so as not to cause distractions which would divert a driver's attention from any warning or traffic control signs and the existence of an intersection, there is no evidence of a violation of said duty to support plaintiff's claim other than the testimony of the eastbound driver, William Rector as to his habit in driving.

Evidence of habit or general practice is not admissible as proof of behavior or conformity with that habit on a specific occasion. Peo. vs. West, 102 Ill. App. 3d 50; Goetz vs. Country Mutual Insurance

Company, 28 Ill. App. 3d 154, 328 N.E. 2d 102;

Even if such testimony were to be held admissible, neither William Rector nor John Gibbs, his passenger, had or apparently have any recollection of what happened and it could result in nothing but pure speculation.

While this court does not find a duty or breach thereof, if one were to assume their existence, plaintiff would still be required to show that such breach was the proximate cuase of the injury.

The law is clear that there may be more than one proximate cause of an injury and the negligence of a defendant will not constitute a proximate cause of a plaintiff's injuries if some intervening act supersedes the defendant's negligence, but if the defendants could reasonably foresee the intervening act, that act will

not relieve the defendant of liability. Bentley vs. Saunemen Township, 83 Ill. 2d 10, 46 Ill. Dec., 129, 413 N.E. 2d 1242.

Generally the issue of proximate cause is for the trier of fact and the test is whether the first wrongdoer should have reasonably foreseen the intervening cause as a natural and probable result of his negligence. If the act of the third party is the immediate cause of injury and is such as in the exercise of reasonable diligence would not be anticipated and the third person is not under the control of the one guilty of the original wrong, the connection is broken and the first act or omission is not the proximate cause of the injury. Merlo vs. Public Service Co. 381 Ill. 300, 45 N.E. 2d 665. (Emphasis added)

The question of what constitutes the proximate cause of the injury only becomes

a question of law when the facts are not only undisputed but are also such that there can be no difference in the judgment of reasonable men as to the inferences to be drawn from them.

In this case the facts are not in dispute. William Rector went through a stop sign when he had a duty to stop and he caused the accident. Neither the county nor the township could reasonably be expected to anticipate he would not obey the law. On the contrary, they had a right to anticipate he and others using the road would obey the law and stop. To hold otherwise would require them to make four-way stops at all intersections and this is neither reasonable nor practical. It would, in effect, make them insurers.

Even if we assume the defendants created a condition by which the injuries were made possible, the injuries which

were sustained were not a natural or probable result of their acts and their acts, if any, were not the proximate cause of the injuries.

This court therefore finds that the motions for summary judgment filed by the defendants, Hopkins Township, Illinois, and Whiteside County, Illinois, should be granted.

Dated this 9th day of December, 1987.

/s/ Robert W. Castendyck
ROBERT W. CASTENDYCK
CIRCUIT JUDGE

APPENDIX D

68717 ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

October 5, 1989

Mr. William E. Gottfred
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Rockford, IL 61103

No. 68717 - Betty A. Donaldson, et al., petitioners, v. Hopkins Township, Illinois, etc., et al., respondents. Leave to appeal, Appellate Court, Third Districtl.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 27, 1989.

Supreme Court, U.S.
FILED
JAN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1114

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

BETTY DONALDSON, DERYL W. DONALDSON and CHARLES M. ELLER, as Executor of the Estate of FAYE RAYE ELLER, deceased,

Petitioners,

No. 84-L-73 and 85-L-169

vs.

HOPKINS TOWNSHIP, ILLINOIS, a municipal corporation, and WHITESIDE COUNTY, ILLINOIS, a municipal corporation,

Respondents.

BRIEF ON BEHALF OF HOPKINS TOWNSHIP, A MUNICIPAL CORPORATION, OPPOSING CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

BETTY DONALDSON, DERYL W. DONALDSON and CHARLES M. ELLER, as Executor of the Estate of FAYE RAYE ELLER, deceased,

Petitioners,

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HOPKINS TOWNSHIP, ILLINOIS, a municipal corporation, and WHITESIDE COUNTY, ILLINOIS, a municipal corporation,

Respondents.

BRIEF ON BEHALF OF HOPKINS TOWNSHIP, A MUNICIPAL CORPORATION, OPPOSING CERTIORARI

REASONS WHY THE WRIT SHOULD BE DENIED:

I

This Court has no jurisdiction over Hopkins Township. No federal question was raised in the State Court, nor is it raised in this Court, as to Hopkins Township.

Supreme Court Rule 14.1(h).

Cardenale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162.

Tacon v. Arizona, 410 U.S. 351, 35 L.Ed.2d 346, 93 S.Ct. 998.

II

Although Hopkins Township, against whom separate causes of action were filed, is a respondent to the Petition, neither in the Statement of the Case nor in the Argument for Granting the Writ do petitioners support their request that this Court grant Writ of Certiorari as it pertains to Hopkins Township. Hopkins Township is not mentioned in the Petition

except in the caption and to identify the location of Hazel Road.

Therefore, the Petition for Writ of Certiorari as to Hopkins Township, a municipal corporation, should be denied.

Respectfully submitted,

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*Counsel of record

(3)

Supreme Court, U.S.
FILED
FEB 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BETTY DONALDSON, DERYL W. DONALDSON and CHARLES M. ELLER, as Executor of the Estate of FAYE RAYE ELLER, Deceased,

Petitioners,

vs.

HOPKINS TOWNSHIP, ILLINOIS, a Municipal Corporation, and WHITESIDE COUNTY, ILLINOIS, a Municipal Corporation,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Illinois

BRIEF OF RESPONDENT WHITESIDE COUNTY IN OPPOSITION

CHARLES C. HOPPE, JR.
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No. 89-1114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BETTY DONALDSON, DERYL W. DONALDSON and CHARLES M. ELLER, as Executor of the Estate of FAYE RAYE ELLER, Deceased,

Petitioners,

vs.

HOPKINS TOWNSHIP, ILLINOIS, a Municipal Corporation, and WHITESIDE COUNTY, ILLINOIS, a Municipal Corporation,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Illinois

BRIEF OF RESPONDENT WHITESIDE COUNTY IN OPPOSITION

The Respondent, Whiteside County, Illinois, a municipal corporation, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Illinois Appellate Court's decision in this case.

STATEMENT OF THE CASE

On April 24, 1983, petitioners Betty Donaldson and Faye Raye Eller, deceased, were involved in an automobile accident at an intersection of a Whiteside County road and a Hopkins Township road. Petitioners were passengers in an automobile travelling northbound on the Whiteside County road which was a through road. The Hopkins Township road ran generally east and west and had a visible, properly posted stop ahead sign and stop sign controlling eastbound vehicles requiring them to stop before entering the Whiteside County road. The petitioners' vehicle was struck by an eastbound automobile on the Hopkins Township road that failed to stop before entering the intersection in violation of the stop sign.

The trial court granted summary judgment in favor of Whiteside County and Hopkins Township finding that respondents owed petitioners no statutory or common law duty and that petitioners failed to establish proximate cause as a matter of law.

The Illinois Appellate Court affirmed the trial court on all grounds in an unpublished order issued under Rule 23 of the Illinois Supreme Court Rules. The Illinois Supreme Court denied petitioners' petition for leave to appeal. The petition for writ of certiorari followed.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The judgment of the state court rests on independent and adequate state grounds and does not warrant review by this Court.

II. No important federal question has been decided by the Illinois Appellate Court's order to warrant a grant of a writ of certiorari.

ARGUMENT

I.

THE JUDGMENT OF THE STATE COURT RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS AND DOES NOT WARRANT REVIEW BY THIS COURT.

Petitioners' entire claim that they were deprived of a constitutionally protected property right rests upon an unfounded assumption that a viable cause of action was extinguished by the 1987 amendments to the Illinois Local Governmental and Governmental Employees Tort Immunity Act. Petitioners further mistakenly assume that the court below erroneously applied the amended act resulting in the defeat of an otherwise viable claim. No federal question of any kind was raised by petitioners in the state trial court and no federal law, rule or regulation is involved.

Petitioners' alleged constitutional deprivation hinges upon a review of an appellate court order affirming the

dismissal of petitioners' case by the trial court on strictly state grounds; no statutory duty, no common law duty and no proximate cause as a matter of law. Petitioners do not claim the trial court's dismissal infringed upon any constitutional right and never advanced such a claim on appeal in the Illinois Appellate Court. Petitioners' claimed constitutional property right was first raised after the appellate court rendered the order appealed from.

Since independent and adequate state grounds exist for the dismissal of petitioners' cause of action separate and apart from the constitutional question asserted by petitioners, this Court should not review the decision of the Illinois courts in this case. 28 U.S.C. § 1257(2), *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Michigan v. Long*, 463 U.S. 1032, 77 L.Ed.2d 1201, 103 S.Ct. 3469 (1983); *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 53 L.Ed.2d 965, 97 S.Ct. 2849 (1977); *Ridgeway v. Ridgeway*, 454 U.S. 46, 70 L.Ed.2d 39, 102 S.Ct. 49 (1981).

When the trial court granted summary judgment in favor of Whiteside County and Hopkins Township, it did so not only on the basis that the court found no duty to post signs as claimed by petitioners, but also on the basis that petitioners had failed to establish a causal relationship between the alleged negligence and the injuries sustained. In the trial court, Judge Castendych in his Memorandum Opinion stated:

> The court, after carefully considering the briefs and arguments of counsel finds there was no duty on the part of Whiteside County as claimed by Plaintiffs.
>
> The court further finds there was no duty on the part of Hopkins Township to place warning devices as claimed.
>
> . . .

> While this court does not find a duty or breach thereof, if one were to assume their existence, Plaintiff would still be required to show that such breach was the proximate cause of the injury.
>
> . . .
>
> Even if we assume the Defendants created a condition by which the injuries were made possible, the injuries which were sustained were not a natural and probable result of their acts and their acts, if any, were not the proximate cause of the injuries.

It is clear from the Memorandum Opinion of the trial court that granted summary judgment, that petitioners failed to sustain a cause of action regardless of the question of duty which forms the basis of petitioners' alleged deprivation of a constitutionally protected property right. Without reference to the question of duty, and regardless of which Tort Immunity Act the appellate court relied upon, petitioners' cause of action independently failed on the issue of proximate cause. This finding of the lower court was affirmed by the appellate court when it stated:

> A *prima facie* case has not been alleged. The Plaintiff has also failed to establish a causal relationship between the alleged negligence and the injuries she sustained. (App. A, p. 9)

Even if this Court were to order the Appellate Court of Illinois to rely on the 1965 Tort Immunity Act, petitioners' cause of action would still fail.

> . . . Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we correct its view of federal laws, our review would amount to nothing more than an advisory opinion. (*Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).)

The Illinois Appellate Court affirmed the granting of summary judgment on the basis that the appellate court found neither a statutory duty nor a common law duty owed by either Whiteside County or Hopkins Township. It further specifically found that no *prima facie* case had been established as petitioners failed to establish a causal relationship between the alleged negligence and the injuries sustained. The appellate court affirmed the trial court on all the bases cited by the trial court, not just the duty issue. The appellate court stated:

> For all of the foregoing reasons the judgment of the Circuit Court of Whiteside County in favor of the Defendants, Hopkins Township and Whiteside County is affirmed.

Petitioners entire basis for seeking this writ of certiorari rests upon an unfounded assumption that the Illinois Appellate Court relied on the wrong statute, the 1987 Tort Immunity Act rather than the 1965 Act. The only reference to the 1987 Act is in one citation in the court's order. A review of the order demonstrates that the crux of the ruling makes no reference to the 1987 Act or its amendments. Assuming *arguendo*, that the appellate court did rely upon and apply the 1987 Act, there still remains an independent and adequate state ground to support the appellate court affirming the summary judgment; petitioners failed to establish proximate cause as a matter of law.

In making its decision the trial court ruled on all the facts presented to it and made its decision without reference to any issue of federal law or constitutional deprivation. Petitioners do not urge otherwise. This Court does not review findings of fact by a state court which do not affect the ruling on the federal question which brings the case before it. *Grayson v. Harris*, 267 U.S. 351 (1925).

The trial court decided the facts and ruled that no causal relation existed as a matter of law. This was clearly an independent and wholly adequate state ground.

Accordingly, an independent and adequate state ground for granting summary judgment and terminating petitioners' cause of action exists and this Court should not review this judgment.

II.

NO IMPORTANT FEDERAL QUESTION HAS BEEN DECIDED BY THE ILLINOIS APPELLATE COURT'S ORDER TO WARRANT A GRANT OF A WRIT OF CERTIORARI.

No question of federal law was decided by the state court when it granted respondents summary judgment. No federal rule, regulation, statute or ordinance was involved. The case did not involve an interpretation of the U.S. Constitution or treaties. The challenged Illinois order simply reviewed the evidence in an automobile personal injury case, applied state law and determined the respondents were entitled to summary judgment as a matter of state law. In doing so the state court did not rely on any federal law.

The state court simply found the respondents owed no legal duty to petitioners and further held that assuming a duty was owed, the other essential element of proximate cause was noticeably absent and independently fatal to plaintiffs' state tort claim. Illinois tort law requires a legally recognized duty, a breach thereof and damages proximately caused as a result of the breach to establish a *prima facie* case in negligence.

The order appealed from reflects nothing more than an application of fundamental state negligence law to an

auto accident. No issue of constitutional proportion or magnitude is raised by this case or the ruling of the appellate court. Petitioners assertion to the contrary is misplaced.

A fair and dispassionate review of the appellate court order demonstrates that the court's opinion did not turn upon the application of substantive changes in the Illinois Local Governmental and Governmental Employees Tort Immunity Act. It is clear that regardless of whether the 1965 or 1987 Act governed, the Act has never served under Illinois law as an extension for a basis of liability. In other words, Illinois law has consistently and correctly held that its Tort Immunity Act is not a source of creating a duty on the part of a municipality where one otherwise does not exist. (*Hannon v. Counihan*, 54 Ill.App.3d 509, 369 N.E.2d 917 (1977); *Havens v. Harris Township*, 175 Ill.App.3d 768, 530 N.E.2d 284 (1988); *Porter v. City of Urbana*, 88 Ill.App.3d 443, 410 N.E.2d 610 (1980); *Swett v. Village of Algonquin*, 169 Ill.App.3d 78, 523 N.E.2d 610 (1980).)

This principle existed long before the 1987 revisions to the Act and was in fact the basis for the Illinois Appellate Court's rejection of plaintiffs attempt to plead a duty under the Act. The heart of the appellate court order appealed from stated without any reference to the 1987 amendments as follows:

> Similarly, the Local Governmental and Governmental Employees Tort Immunity Act is an Act relative to the tort immunity of local public entities and their employees. The statute confers immunities; and its extension as a basis for liability is not warranted by the facts at bar. (App. A, p. 6)

The aforementioned legal precedent was well established in Illinois law long before the 1987 amendments. (*Hannon*

v. Counihan, 54 Ill.App.3d 509, 369 N.E.2d 917 (1977); *Porter v. City of Urbana*, 88 Ill.App.3d 443, 410 N.E.2d 610 (1980); *Swett v. Village of Algonquin*, 169 Ill.App.3d 78, 523 N.E.2d 610 (1980).)

Petitioners summarily assume that the appellate court retroactively applied the 1987 amendments to this case without reference to the order or the legal precedent applied by the Illinois Appellate Court.

The aforementioned precedent that the Local Governmental and Governmental Employees Tort Immunity Act does not serve as a basis for establishing duties which do not otherwise exist was unaffected by the 1987 amendments. The legal principle involved in no way touches or concerns a constitutional or federal right or privilege.

Petitioners' petition fails to address or refer to the reasoning of the court below. Neither the 1965 or 1987 Tort Immunity Act creates causes of action or imposes duties under Illinois law that do not otherwise exist. Therefore it is a legal impossibility for any changes in the Act to deprive plaintiffs of a cause of action.

Petitioners were not deprived of a cause of action or a property right under the Fourteenth Amendment because one never existed under Illinois law. This was the premise of the Illinois Appellate Court's holding and as such no constitutional or federal issue has been affected by the appellate court's ruling.

The appellate court issued a non-published order pursuant to Illinois Supreme Court Rule 23 affirming the trial court's judgment. Such an order is limited strictly to the parties of this particular litigation and has no precedential value. Illinois Supreme Court Rule 23 provides in part:

> A case shall be disposed of by opinion when a majority of the panel deciding the case determines that (1) the case involves an important new legal issue or modifies or questions an existing rule of law; or (2) the decision considers a conflict or apparent conflict of authority within the appellate court; (3) the decision is of substantial public interest; or (4) the opinion constitutes a significant contribution to legal literature by either an historical review of law or by describing legislative history. . . .
>
> All cases not required by the foregoing paragraph to be disposed of by opinion shall be disposed of by a written order . . . Orders are not precedential and will not be published. . . . (Illinois Supreme Court Rule 23, 110A S.H.A. 23 (1989).)

The Illinois Appellate Court's order in this case is, therefore, limited to the unique matters present in this litigation and does not qualify for review by this Court. No new rule of law or constitutional issue is decided.

The only reference to the 1987 Tort Immunity Act is in one citation in the appellate court order. Petitioners caused this petition to be brought to the appellate court's attention on a petition for reconsideration which was denied. Similarly the Illinois Supreme Court denied hearing this case. Petitioners failed to prove proximate cause as a matter of state law.

No important federal question has been decided by the state courts herein to warrant review by the United States Supreme Court.

CONCLUSION

Petitioners' cause of action was terminated by the trial court when it entered summary judgment finding that petitioners failed to establish a legal duty (statutory or common law) owed by respondents or a breach of duty proximately causing petitioners' injuries. The appellate court affirmed on independent state grounds with no important federal question meriting this Court's review. The Illinois Supreme Court found no compelling reason to review the appellate court's decision and since an independent state ground for terminating petitioners' cause of action exists, this case is not worthy of this Court's consideration.

Respectfully submitted,

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